CO-OPERATIVE CENTRAL BANK LTD.

v.

CHE WAN DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[O.S. NO. S7-24(31)-1116 OF 1988]
2 MAY 1991

CIVIL PROCEDURE: *Taxation of costs - Party-and-party basis - Solicitor and client basis - Common fund - Exceptional circumstance - Justification - General basis of taxation - Discontinuance by plaintiffs - Res integra - Rules of the High Court 1980, O. 59 rr. 12, 27, 28 - Courts of Judicature Act 1964, Schedule, Item 15.*

On 26 April 1988 the plaintiffs CCB applied for an order for sale of 31 pieces of land charged by the defendant CW to CCB as security for a loan of RM20 million; CW had defaulted in its repayment. On 23 May 1988 CW filed its memorandum of appearance but CW never filed an affidavit to contest CCB's action.

On 5 May 1989 CCB applied for an adjournment *sine die* pending appeal to the Supreme Court on a similar matter. In that case brought by CW as chargors, N.H. Chan J had found that the charge created by CW was void on the ground that it was made contrary to s. 133 of the Companies Act 1965 (the Act). On appeal to the Supreme Court, that decision had been upheld. CW then applied for this hearing to be restored.

On 6 June 1989, the date fixed to hear CCB's originating summons, CCB withdrew its action. CW had no objection to the withdrawal but demanded that costs be taxed on a solicitor and client basis and be paid by CCB to CW.

The issue before the Court is therefore, whether upon the discontinuance of this action by CCW, CW is entitled to costs, and if so, whether taxation should be on a party-to-party basis or on solicitor-client basis.

Held:

[1] The question of whether the taxation should be on a party-to-party basis or on some other basis is a question which should be decided by a trial Judge.

[2] CW are entitled to costs upon the withdrawal of the action by CCB as CW had applied for costs in the proceedings at the time that CCB applied for leave to withdraw the action. The Court had allowed the application for withdrawal by CCB upon payment of costs to CW.

[3] The power to order costs on a common fund basis should not be exercised arbitrarily; before the Court departs from the general basis of taxation on a solicitor-client basis, there should be some special or unusual feature in the case which justifies the Court to do so.

[4] In this case there is no justification for CW to apply for the costs in the action to be assessed either under the common fund basis or solicitor and client basis as:

(a) CCB's action in this case was not frivolous or vexatious;

(b) it is not an abuse of process of the Court for CCB to defend the action instituted by CW as s. 133 of the Act does not expressly state that failure to register a charge on land of a company would render the charge void;

(c) CCB's appeal to the Supreme Court against N.H. Chan's decision was not an abuse of process of Court; the delay of CCB's Counsel in not withdrawing this action immediately after the Supreme Court decision was not conduct which was unco-operative or grossly dilatory. Further, CW had immediately sought a hearing date for this matter and it was not unusual for CCB to wait until the hearing to withdraw its action;

(d) CW's failure to apply to N.H. Chan for the assessment of costs on a common fund or solicitor-client basis indicates that CW were not sure that they were entitled to tax costs outside party and party costs and

(e) CW had been paid the costs under their action instituted before N.H. Chan J and another set of costs under the present action.

[5] Unless a plaintiff had contracted with a defendant to pay costs which would be taxed on a solicitor and client basis, a plaintiff can ask for anything in their originating summons, although it does necessarily mean that they will be granted what is being sought.

[Costs payable to be taxed on a party and party basis.]

Cases referred to:
Greenhouse v. Hetherington & Anor. [1978] Vol 122 No 3 SJ 47
Preston v. Preston [1982] 1 All ER 41
E.M.I. Records v. Ivan Wallace Ltd. [1983] 1 Ch 59

Legislation referred to:
Companies Act 1965, ss. 108, 133
Rules of the High Court 1980, O. 59 r. 12, r. 27(1), (2), (3), (4), r. 28(1), (2), (3)
Rules of the Supreme Court 1965 [UK], O. 62 r. 28, r. 29(1), (2), (3)

Other source referred to:
Supreme Court Practice 1979 Edn. (England), p. 1014, rr. 29(1), (2), (3)

For the Applicant - Prem J. Ganapathy; M/s. Albar Zulkifli & Yap
For the Respondent - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Lim Beng Choon J:

The questions posed to me in this action are whether upon the discontinuance of this action by leave of Court the defendants are entitled to costs and if so whether the costs should be taxed on a party-to-party basis or on solicitor and client basis. Although the questions posed to me appear to be simple nevertheless as there is no local precedent and the matter is *res integra* much exercise has been expanded in looking up English authorities dealing with the question of costs which may be of assistance to me in arriving at a just decision. For this I must mention that Counsel acting for the respective parties have drawn my attention to two English cases which are of some assistance to me.

It is necessary at the outset to give a background of this case in order that one can appreciate how the said question arose.

On 26 April 1988 the plaintiffs filed this action for an order for sale of some 31 pieces of land of which the defendants were and still are the registered proprietors and which were charged to the plaintiffs for a loan of RM20 million. As the defendants failed to repay the loan according to the terms set out in the annexure to the charge the plaintiffs carried out

the usual procedure to demand payment by letter and thereafter the serving of the usual notice in Form 16D. As the defendants failed to make any payment within the time stipulated in the said Form 16D the plaintiffs therefore instituted this action on 26 April 1988 for an order for sale of the 31 pieces of land to satisfy the sum of RM24,005,249.06 being the sum loaned to the defendants plus accrued interest. After service of this originating summons on the plaintiffs, the defendants filed their memorandum of appearance on 23 May 1988. Thereafter the plaintiffs took out a notice of appointment to hear the originating summons on 2 June 1988 which was also duly served on the defendants. It is important to note that at all material times the defendants had not filed an affidavit to contest the plaintiffs' action. The significance of this omission can be seen later in this judgment.

The matter came on for hearing on 13 December 1988 but it was postponed to 5 May 1989 for mention. Unfortunately the reason for the postponement was not stated. When the matter came on for mention on the said date before me, Counsel for the plaintiffs applied for an adjournment *sine die* of this action "pending appeal to the Supreme Court on a similar matter in respect of which N.H. Chan J has made a ruling." As the Counsel for the defendants had no objection I allowed the application for adjournment *sine die*. On 25 April 1990 solicitors for the defendants wrote to this Court stating that the appeal of the plaintiffs against the ruling of my brethren N.H. Chan J was dismissed by the Supreme Court on 23 April 1990 and requesting that this originating summons be restored for hearing. With the letter, the written judgment of N.H. Chan J was enclosed. Later on 4 May 1989 the managing director of the defendants affirmed and filed in an affidavit on the same date enclosing an order made by N.H. Chan J on 24 April 1989. Upon my reading of the order of 24 April 1989 and the judgment of N.H. Chan J, I realised that the defendants in this action had instituted an action under Originating Summons No. 31-3640 of 1988 on 24 November 1988 as plaintiffs apparently asking for a declaration that the charge of the 31 pieces of land made by them to the chargee in the present action was void on the ground that the loan secured by the charge was made in contravention of s. 133 of the Companies Act 1965. N.H. Chan J found for the chargor and therefore cancelled the charge and ordered the return of all documents of title to the chargor.

Upon receipt of the defendants' letter mentioned above and the affidavit of their managing director I fixed 8 August 1989 for the hearing of the present originating summons. On the date of the hearing plaintiffs' Counsel applied for leave to withdraw their original summons in the present case. Counsel for the defendants had no objection to the application for withdrawal but insisted on costs to be taxed on a solicitor and client basis and to be paid by the plaintiffs to the defendants. I therefore allowed the withdrawal and postponed the hearing for costs to 3 September 1990. I also questioned Counsel for the defendants as to whether the matter relating to taxation should not properly be dealt by the Senior Assistant Registrar as the taxing officer of the Court pursuant to O. 59 r. 12 of the Rules of the High Court 1980. Counsel for the defendants disagreed and indicated that he would give his reasons. On 14 August 1990 he gave his reasons by letter. I do not propose to reproduce the contents of the letter as I am satisfied that on the question of whether the taxation should be on a party-to-party basis or on some other basis such issue should be determined by the trial Judge. On 8 August 1990 Counsel for the defendants also submitted a written submission to support his contention that the defendants were entitled to taxed costs based on a solicitor and client basis. The matter came on for hearing on 3 September 1990. As Counsel for the defendants had put in two written submissions I felt it was fair that Counsel for the plaintiffs should also be given an opportunity to file in his written submission

and I duly directed that the said Counsel should do so on or before 10 September 1990. Counsel for the plaintiffs did file in his written submission on that date. I do not propose to set out the contents of the submissions of the respective Counsel as I will be touching on the more relevant parts of their submissions in this judgment.

I shall first deal with the question of whether the defendants are entitled to costs upon the withdrawal of the action against them. The short answer is certainly in the affirmative because upon the plaintiffs applying for leave to withdraw the action against the defendants, Counsel for the defendants applied to me for costs of the proceeding and I allowed the application to withdraw the action upon the payment of costs to the defendants. Indeed Counsel for the defendants asked for costs to be taxed on the basis of solicitor and client costs.

The laws applicable to the power of the High Court to make an order relating to costs can first be found in item 15 of the schedule to the Courts of Judicature Act 1964 (Act 91) which amongst the additional powers of High Court, is the "power to award costs". The rules regulating the assessment of costs which are relevant to this case can be found in subrules (1), (2), (3) and (4) of r. 27 O. 59 of the Rules of High Court 1980 (RHC) which reads:

> 27(1) This rule applies to costs which by or under these rules or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund (other than a fund which the party to whom the costs are to be paid holds as trustee or personal representative).
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> (2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.
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> (3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so order or direct that the costs shall be taxed on the common fund basis.
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> (4) On a taxation on the common fund basis, being a more generous basis than that provided for by para. (2), there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and para. (2) shall not apply; and accordingly in all cases where costs are to be taxed on the common fund basis the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid.

Assessment of solicitor and client costs is provided in subrules (1), (2) and (3) of r. 28 of O. 59 of RHC which reads:

> 28(1) On the taxation of a solicitor's bill to his own client (except a bill with respect to non-contentious business) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.
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> (2) For the purpose of para. (1), all costs incurred with the express or implied approval of the client shall, subject to para. (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.
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> (3) For the purpose of para. (1), any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs in a case to which r. 27(2) applies, shall, unless the solicitor expressly informed his client before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred.

The same provisions can be found in the English Rules of Supreme Court 1965. Thus the counterpart of subrules (1) to (4) of r. 27 of O. 59 of our RHC is subrules (1) to (4) of O. 62 r. 28 of the English rules and subrules (1) to (3) of O. 28 are in substance the same as subrules (1) to (3) of O. 62 r. 29 of the English rules. That being the case it is useful to examine some of the English cases on this question of costs.

The first case I shall refer to is the case of *Greenhouse v. Hetherington & Anor.* [1978] Vol. 122 No. 3 SJ p. 47 where Roskill LJ held that a judge had the discretion to order costs to be assessed either under O. 62 r. 28 or r. 29 - it was for him to decide. The learned appeal Judge seemed to suggest that the discretion of a Judge to order how costs should be assessed was unfettered. This led to the following comment made in the *English Supreme Court Practice 1979* Edn., p. 1014:

> In *Greenhouse v. Hetherington* [1977] 122 SJ 47 Court of Appeal held that a Court had jurisdiction to order costs *inter partes* to be paid on a solicitor and own client basis. In such a case the paying party will be liable to pay for any piece of business properly inserted in the bill and it is not open to him to object that payments sanctioned by the client are excessive (*Re Cohen v. Cohen* [1905] 2 Ch. 137). Consequently the paying party will be liable for costs which were beyond his knowledge and contemplation and may have been unreasonably incurred, be unreasonable in amount or unusual in their nature. It is therefore submitted that such an order should be made by the Court, or consented to be the paying party, only in wholly exceptional circumstances.

The proposition of Roskill LJ in the *Greenhouse* case was commented on by Robert Megarry VC in *E.M.I Records v. Ian Wallace Ltd.* [1983] 1 Ch. 59 at 75 where he said:

> I would add two points. First, there is a valuable note to r. 29 in *The Supreme Court Practice* (1982), p. 1064. This points out the difficulty in applying *Greenhouse v. Hetherington* 122 SJ 47, assuming, as I think the note does, that the order in that case made not only r. 29(1) applicable, but also r. 29(2) and (3). The note states the result as being that the paying party will be liable for costs which were beyond his knowledge and contemplation, which may have been unreasonably incurred, and which may be unreasonable in amount or unusual in their nature. On that footing, the note suggests that such an order should be made or consented to only in wholly exceptional circumstances. With that suggestion I entirely agree.

Counsel for the defendants in the present case drew my attention to the observation of Robert Megarry VC in the *E.M.I. Records* case p. 63 where his Lordship briefly defined the five main bases of taxation to be considered and Counsel urged me to adopt the learned appeal Judge's approach by allowing the assessment of taxation on solicitor and client basis pursuant to O. 62 r. 29(1) of the English Rules of Supreme Court. A careful reading of the *E.M.I. Records* case shows that the order for the payment of costs emanates from two motions for contempt of Court and the trial Judge found that gross contempt had been committed and he had fined the contemner £10,000 and at the same time ordered costs on an indemnity basis. In holding the order of the trial Judge on costs was incorrect Robert Megarry VC went on to say at p. 65 of the reported case:

> (5) The indemnity basis. The RSC contain no express mention of any such basis, and there seems to be no clear statement of what such a basis means. Yet for many years the Courts have been making such orders, particularly against contemnors, and the taxing masters have been having to do their best to tax costs under such orders. I bear in mind, of course, that the present version of RSC, O. 62 (apart from subsequent amendments) was brought into force

at the beginning of 1960 (see the Rules of the Supreme Court (No. 3) 1959: S.I. 1959 No. 1958 (L13), and so what was said under the former rules does not necessarily apply today. Yet the practice of making such orders, long common place before 1960, has continued to this day; and often such orders have been more or less equated with orders for costs as between solicitor and own client.

The learned appeal Judge therefore revoked the taxation of costs on an indemnity basis and substituted it with a solicitor and client basis. Even then the said Judge added a word of caution to those claiming for such costs by saying:

In fact, an order for solicitor and own client costs seems to be not only **the most stringent order** that can be made but also an order which, by virtue of r. 29(2), **is capable of being severely penal in its effect.** Those who seek such an order should realise that they are asking that the other side should pay not only all their costs which are not unreasonable, but also all their other costs, however unreasonable or extravagant they are, so long as their clients approved them; and well might they hesitate if they were required to seek such an order in terms. (*Ibid* p. 74). (Emphasis is mine).

From my reading of the judgment in *E.M.I. Records* case the most I can say is that it laid down the principle that the assessment of costs on solicitor client basis could be justified if there are exceptional circumstances to justify it.

The next case I would refer to is the case of *Preston v. Preston* [1982] 1 All ER 41. This was a matrimonial case where the wife applied for substantial maintenance and a half share of the matrimonial home. The trial Judge found for the wife and ordered the husband to pay costs to be assessed under a common fund basis pursuant to O. 62 r. 28 and subrule (4) of the English Rules of Supreme Court 1965. The husband was not satisfied with the judgment of the trial Judge and appealed against his judgment to the Court of Appeal. We are not concerned with that part of the judgment of the appeal Judges concerning the ancillary reliefs applied by the wife and I need only to concentrate on the part of the judgment relating to the assessment of costs. Ormrod LJ in refusing to interfere with the trial Judge's decision on costs said at p. 50:

On the question of costs, the Judge's decision to award costs on the common fund basis was *an unusual order to make* in this type of case. RSC O. 62 r. 28(3), however, appears to give the Court an unfettered discretion to order costs on this basis, but it is not in accordance with usual practice to do *so unless there is a particular reason for departing from normal practice.* It is sometimes vitally important for a wife to receive the provision made for her in full without having to find the difference between party and party costs and costs on a common fund basis. That does not, of course, apply in this case, but *the Judge was very unfavourably impressed by the unco-operative and grossly dilatory way in which the husband's former solicitors had conducted the preparatory stages of the case, which must have considerably increased the wife's costs.* (Emphasis is mine)

Brandon LJ the second appeal Judge adopted a similar approach by saying:

On the true construction of paras. (2) and (3) of r. 28 taken together, however, I do not consider that the power to order costs to be taxed on a common fund basis is intended to be exercised arbitrarily or whimsically. On the contrary, it appears to me that *it is necessary, before the Court departs from the general basis of taxation laid down in para. (2) and directors taxation on the more generous basis authorised by para. (3), that there should be some special or unusual feature in the case to justify the Court in exercising its discretion in that way.* That appears to have been the approach adopted by Paull J in *Layzell v. British Portland Cement Manufacturers Ltd.* [1961] 1 All ER 244, [1961] 1 WLR 557 and more recently by Brightman J *Marx v. Estates and General Investments Ltd.* [1975] 3 All ER 1064, [1976] 1 WLR 380.

In the former case the ground on which Paull J awarded costs on a common fund basis was that the action was one for damages for serious personal injuries brought by a minor through his next friend, and the Judge considered that, the action having succeeded, the next friend should not, so far as possible, be left out of pocket in respect of the costs which he had incurred. In the latter case Brightman J considered that the plaintiffs had done a great service to the members of the defendant company because they had prevented a purchase taking place which, in accordance with the Judge's decision, was against the will of the majority of those members voting on it. On that ground he thought it right to exercise his discretion by ordering that the plaintiff should have their costs taxed on a common fund, rather than a party and party, basis.

In the present case the Judge exercised his discretion to award the wife her costs on a common fund basis on the ground that the husband's solicitors had, by their extreme dilatoriness and lack of proper co-operation in conducting the proceedings, enormously increased the costs incurred by the wife, with the result that, if the wife only got her costs on a party and party basis, she would have to bear an unusually heavy loss in unrecovered costs. (*Ibid* pp. 58-59) - (Emphasis is mine).

Applying the principles laid down in the cases cited above, I must ask myself whether there is any particular or special circumstance in the present case that will justify the defendants' claim for costs to be assessed under the common fund basis or solicitor and client basis. Firstly the action instituted for an order for sale of a charged property can by no means be said to be a frivolous or vexatious action. Secondly unlike s. 108 of the Companies Act where it is provided that failure to register a charge on land of a company would render the charge void, s. 133 does not expressly say so. Therefore it is not an abuse of the process of the Court on the part of the plaintiffs to defend the action instituted by the defendants in Originating Summons No. 31-3640-88. Thirdly the fact that the plaintiffs chose to appeal to the Supreme Court against N.H. Chan's decision cannot likewise be said that the plaintiffs were abusing the process of Court for they were statutorily entitled to do so. The only fault, if one can call it a fault, is that upon the pronouncement of the decision of the Supreme Court the plaintiffs were not quick enough to discontinue the action. On this point I am not prepared to say that the Counsel for the plaintiffs was unco-operative or grossly dilatory in not withdrawing the action soon after the pronouncement of the judgment of the Supreme Court simply because even before the plaintiffs could do anything, Counsel for the defendants flushed with excitement and pleasure arising from his success in the appeal before the Supreme Court wrote a letter to this Court on 25 April 1990, two days after the Supreme Court had delivered its judgment, requesting that the present action be restored for hearing and a hearing date to be fixed. On 25 May this Court by notice informed Counsel for the respective parties that the action had been fixed for hearing on 8 August 1990. It cannot be said that it is unusual for the plaintiffs to wait for the hearing of the action on 8 August to withdraw their action. Bearing in mind that the decision of the Supreme Court is binding on me, any suggestion that the counsel for the defendants had some preparation to do in order to oppose any points raised by the plaintiffs is utterly unacceptable. Indeed even in the present originating summons of the plaintiffs the defendants had not filed in a single affidavit to oppose the plaintiffs' application. In any case there has been a delay of less than 4 months after the decision of the Supreme Court was made before the plaintiffs withdrew their application. Fourthly if the defendants were of the opinion that the costs should be assessed on a common fund basis or on solicitor client basis they should apply to N.H. Chan J when the learned Judge made his decision in favour of the defendants. Failing to do so it indicates that they were not sure that they were entitled to tax costs outside the scope of party and party costs. Finally the defendants had been paid the costs under their action instituted before N.H. Chan J and another set of costs under the present action.

In the ultimate analysis I can see no justification on the part of the defendants to apply for the costs in this action to be assessed either under the common fund basis or solicitor and client basis. In arriving at this conclusion I have not overlooked the argument of Counsel for the defendants when he said that should the plaintiffs win the case, they had in their originating summons asked for costs to be taxed on a solicitor and client basis and it is not fair that the defendants should not have the same privilege. The short answer to this issue is that unless the plaintiffs had contracted with the defendants to pay costs which would be taxed on a solicitor and client basis, the plaintiffs can ask for anything in their originating summons but it does not necessarily mean that they would get it.

For the above reasons I am satisfied that the defendant is not entitled to costs to be taxed on a solicitor and client basis and do order that the costs payable to the defendants be taxed on a party and party basis.

Also found at [1991] 2 CLJ 1507